

Bas, Plaintiff in Error, *versus* Tingy, Defendant in Error. 1800.

IN error from the Circuit Court for the district of *Pennsylvania*. On the return of the record it appeared, by a case stated, that the defendant, in error, had filed a libel in the District Court, as commander of the public armed ship the *Ganges*, for himself and others against the ship *Eliza*, *John Bas*, master, her cargo, &c. in which he set forth that the said ship and cargo belonged to citizens of the *United States*; that they were taken on the high seas by a *French* privateer, on the 31st of *March*, 1799; and that they were re-taken by the libellant, on the 21st of *April* following, after having been above ninety-six hours in possession of the captors. The libel prayed for salvage conformably to the acts of congress; and the facts being admitted by the answer of the respondents, the District Court decreed to the libellants one half of the whole value of ship and cargo. This decree was affirmed in the Circuit Court without argument, and by consent of the parties, in order to expedite a final decision on the present writ of error.

The controversy involved a consideration of the following sections in two acts of congress: By an act of the 28th of *June* 1798, (4 vol. p. 154, s. 2.) it is declared, "That whenever any vessel the property of, or employed by, any citizen of the *United States*, or person resident therein, or any goods or effects belonging to any such citizen, or resident, shall be re-captured by any public armed vessel of the *United States*, the same shall be restored to the former owner, or owners, upon due proof, he or they paying and allowing, as and for salvage to the re-captors, one-eighth part of the value of such vessel, goods and effects, free from all deduction and expenses."

By an act of the 2d of *March*, 1799 (4 vol. p. 472) it is declared, "That for the ships or goods belonging to the citizens of the *United States*, or to the citizens, or subjects, of any nation in amity with the *United States*, if re-taken from the enemy within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, &c. and if above ninety-six hours one-half, all of which is to be paid without any deduction whatsoever, &c. And, by the 9th section of the same act it is declared, "That all the money accruing, or which has already accrued from the sale of prizes, shall be and remain forever a fund for the payment of the half-pay to the officers and seamen, who may be entitled to receive the same."

The case was argued by *Lewis*, and *E. Tilghman*, for the plaintiff in error, and by *Rawle*, and *W. Tilghman*, for the defendant; and the argument turned, principally, upon two inquiries: 1st. Whether the act of *March* 1799, applied only to the event of a future general war? 2d. Whether France was an enemy of the *United States*, within the meaning of the law?

For

1800. *For the plaintiff in error*, it was urged, that the acts, passed in immediate relation to France, were of a restricted, temporary, nature; but that the act of *March 1799* established a permanent system for the government of the navy; and the designation of "the enemy" in that act, applies only to future hostilities, in case of a declared war. That on the just principles of government, every citizen has a right to the public protection; and, therefore, no salvage ought, in strictness, to be allowed for the re-capture of the property of a citizen by a public ship of war. *Vatt. b. 2. c. 6. s. 71.* And congress has manifested, in some degree, their sense on the subject, by making the salvage in that case less, than in the case of re-capture by a private armed vessel. That the word "*enemy*," must be construed according to its legal import; *1 Stra. 278.* and that according to legal interpretation, the differences between the *United States* and *France*, do not constitute *war*, nor render the citizens of *France* enemies of the *United States*. *Vatt. b. 3. s. 69, 70. 1 Black. Com. 257. 2 Black. Com. 259. 2 Burl. 258. s. 31. 261. s. 39. 252.* That a subsequent law does not abrogate a prior law, unless it contains contradictory matter; and where there are no negative, or repealing, words, both must be so construed as to stand together. *11 Co. 61. 63. Show. 439. 10 Mod. 118. 6 Co. 19. b.* That the act of *March 1799*, contains no repealing, or negative, words; and may be applied, consistently, to the case of a future public war, leaving the qualified state of hostility with *France*, for the operation of the preceding law.

For the defendant in error, it was contended, that the relative situation of the *United States* and *France*, is that of "a qualified maritime war;" on the part of the *French* aggressive; on our part, defensive; proceeding from a legitimate expression of the public will, through its constitutional organ, the congress, manifested by public declarations, and open acts. That from such a state, the character of *enemy* necessarily arises; and that the designation being so understood by congress, was intended to be applied, and was actually applied, to *France*. That the act of *March 1799* speaks of prizes, which could only be such as had been captured from *France*; and that taking the word *prize*, according to its legal signification, it means a capture, or acquisition, by right of war, in a state of war. *3 Bl. Com. 69. 108, 2 Wood. 441. Doug. 585. 591. Rob. Adm. Rep. 283.* That if a prize means a capture in war, it follows, of course, that it means a capture from an enemy; for, war can only be waged against enemies. That war may exist without a declaration; a defensive war requires no declaration; and an imperfect, or qualified, public war, is still distinct from the case of letters of marque and reprisal, for the redress of a private wrong, by the employment of a private force. *1 Ruth. b. 1. c. 19. s. 1. p. 470, 1. 2 Ruth. 497, 8. 503. 507. 511. Burl. 196. 189. Vatt. 475. 2 Burl. 204. s. 7. Lee on Capt. 13—39. Puff. 843. Grot. b. 3. c. 3. s. 6. Molloy 46.* That congress,

gress, by repealing the regulations respecting salvage, contained in the act of *March* 1798, has virtually declared, that those regulations were in force, in relation to *France*; and that the provisions, in the act of *March* 1799, being inconsistent with the provision in the act of *June* 1798, the elder law is so far repealed. (1) 1800.

The JUDGES delivered their opinions *seriatim* in the following manner:

MOORE, *Justice*. This case depends on the construction of the act, for the regulation of the navy. It is objected, indeed, that the act applies only to future wars; but its provisions are obviously applicable to the present situation of things, and there is nothing to prevent an immediate commencement of its operation.

It is, however, more particularly urged, that the word "*enemy*" cannot be applied to the *French*; because the section in which it is used, is confined to such a state of war, as would authorise a re-capture of property belonging to a nation *in amity* with the *United States*, and such a state of war, it is said, does not exist between *America* and *France*. A number of books have been cited to furnish a glossary on the word *enemy*; yet, our situation is so extraordinary, that I doubt whether a parallel case can be traced in the history of nations. But, if words are the representatives of ideas, let me ask, by what other word the idea of the relative situation of *America* and *France* could be communicated, than by that of *hostility*, or *war*? And how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of *enemies*? It is for the honour and dignity of both nations, therefore, that they should be called *enemies*; for, it is by that description alone, that either could justify or excuse, the scene of bloodshed, depredation and confiscation, which has unhappily occurred; and, surely, congress could only employ the language of the act of *June* 13, 1798, towards a nation whom she considered as an enemy.

Nor does it follow, that the act of *March* 1799, is to have no operation, because all the cases in which it might operate, are not in existence at the time of passing it. During the present hostilities, it affects the case of re-captured property belonging to our own citizens, and in the event of a future war it might also be applied to the case of re-captured property belonging to a nation in amity with the *United States*. But it is further to be remarked, that all the expressions of the act may be satisfied, even at this very time: for by former laws the re-capture of property, belonging to persons resident within the *United States* is authorised; those residents may be aliens; and, if they are subjects of a nation in amity with the *United States*, they answer completely the description of the law.

(1) All the acts of congress, passed in relation to *France*, were cited and discussed by both sides in the course of the argument; but it is thought unnecessary to refer to them more particularly in this report.

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1800. The only remaining objection, offered on behalf of the plaintiff in error, supposes, that, because there are no repealing or negative words, the last law must be confined to future cases, in order to have a subject for the first law to regulate. But if two laws are inconsistent, (as, in my judgment, the laws in question are) the latter is a virtual repeal of the former, without any express declaration on the subject.

On these grounds, I am clearly of opinion, that the decree of the Circuit Court ought to be affirmed.

WASHINGTON, *Justice*. It is admitted, on all hands, that the defendant in error is entitled to some compensation; but the plaintiff in error contends, that the compensation should be regulated by the act of the 28th June 1798, (4 vol. p. 154. s. 2.) which allows only one-eighth for salvage; while the defendant in error refers his claim to the act of the 2d March, (*ibid.* 456. s. 7.) which makes an allowance of one-half, upon a re-capture from *the enemy*, after an adverse possession of ninety-six hours.

If the defendant's claim is well founded, it follows, that the latter law must virtually have worked a repeal of the former; but this has been denied, for a variety of reasons:

1st. Because the former law relates to re-captures from *the French*, and the latter law relates to re-captures from *the enemy*; and, it is said, that "*the enemy*" is not descriptive of *France*, or of her armed vessels, according to the correct and technical understanding of the word.

The decision of this question must depend upon another; which is, whether, at the time of passing the act of congress of the 2d of March 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and *all* the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is *public war*, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations, though all the members

members are not authorised to commit hostilities such as in a solemn war, where the government restrain the general power. 1800.

Now, if this be the true definition of war, let us see what was the situation of the *United States* in relation to *France*. In *March* 1799, congress had raised an army; stopped all intercourse with *France*; dissolved our treaty; built and equipt ships of war; and commissioned private armed ships; enjoining the former, and authorising the latter, to defend themselves against the armed ships of *France*, to attack them on the high seas, to subdue and take them as prize, and to re-capture armed vessels found in their possession. Here, then, let me ask, what were the technical characters of an *American* and *French* armed vessel, combating on the high seas, with a view the one to subdue the other, and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

2d. But, secondly, it is said, that a war of the imperfect kind, is more properly called acts of hostility, or reprizal, and that congress did not mean to consider the hostility subsisting between *France* and the *United States*, as constituting a state of war.

In support of this position, it has been observed, that in no law prior to *March* 1799, is *France* styled our enemy, nor are we said to be at war. This is true; but neither of these things were necessary to be done: because as to *France*, she was sufficiently described by the title of the *French* republic; and as to *America*, the degree of hostility meant to be carried on, was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by congress, might have constituted a perfect state of war, which was not intended by the government.

3d. It has, likewise, been said, that the 7th section of the act of *March* 1799, embraces cases which, according to pre-existing laws, could not then take place, because no authority had been given to re-capture friendly vessels from the *French*; and this argument was strongly and forcibly pressed.


But, because every case provided for by this law was not then existing, it does not follow, that the law should not operate upon such as did exist, and upon the rest whenever they should arise. It is a permanent law, embracing a variety of subjects, not made in relation to the present war with *France* only, but in relation to any future war with her, or with any other nation. It might then very properly allow salvage for re-capturing of *American* vessels from *France*, which had previously been authorised by law, though it could not immediately apply to the vessels of friends: and whenever such a war should exist between the *United States* and *France*, or any other nation, as according to the law of nations,

1800. or special authority, would justify the re-capture of friendly vessels, it might on that event, with similar propriety, apply to them; which furnishes, I think, the true construction of the act.

The opinion which I delivered at *New-York*, in *Talbot v. Seaman*, was, that although an *American* vessel could not justify the re-taking of a neutral vessel from the *French*, because neither the sort of war that subsisted, nor the special commission under which the *American* acted, authorised the proceeding; yet, that the 7th sect. of the act of 1799, applied to re-captures from *France as an enemy*, in all cases authorised by congress. And on both points, my opinion remains unshaken; or rather has been confirmed by the very able discussion which the subject has lately undergone in this Court, on the appeal from my decree. Another reason has been assigned by the defendant's counsel, why the former law is not to be regarded as repealed by the latter, to wit: that a subsequent affirmative general law cannot repeal a former affirmative special law, if both may stand together. This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws, since the censure only applies where the contradiction appears in the same law; and it does not follow, that a provision which is proper at one time may not be improper at another, when circumstances are changed: but the ground of argument is, that a change ought not to be presumed. Yet, if there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it.

What then is the evidence of legislative will? In fact and in law we are at war: an *American* vessel fighting with a *French* vessel, to subdue and make her prize, is fighting with an enemy accurately and technically speaking: and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of *prizes*, which can only be of property taken at sea from *an enemy, jure belli*; and the 9th section speaks of prizes as taken from *an enemy*, in so many words, alluding to prizes which had been previously taken: but no prize could have been then taken except *from France*: prizes taken from *France* were, therefore, taken from *the enemy*. This then is a legislative interpretation of the word enemy; and if the enemy as to prizes, surely they preserve the same character as to re-captures. Besides, it may be fairly asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn or general? And it must be recollected, that the occasion of making the law of *March* 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property re-taken was placed; a circumstance for which the former salvage law had not provided.

The two laws, upon the whole, cannot be rendered consistent, unless the Court could wink so hard as not to see and know, that
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in fact, in the view of congress, and to every intent and purpose, 1800.
 the possession by a *French* armed vessel of an *American* vessel, 
 was the possession of an *enemy*: and, therefore, in my opinion,
 the decree of the Circuit Court ought to be affirmed.

CHASE, *Justice*. The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the president; and therefore, I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons, which induce me to concur in affirming the decree of the Circuit Court.

An *American* public vessel of war re-captures an *American* merchant vessel from a *French* privateer, after 96 hours possession, and the question is stated, what salvage ought to be allowed? There are two laws on the subject: by the first of which, only one-eighth of the value of the re-captured property is allowed; but by the second, the re-captor is entitled to a moiety. The re-capture happened after the passing of the latter law: and the whole controversy turns on the single question, whether *France* was at that time an *enemy*? If *France* was an enemy, then the law obliges us to decree one half of the value of ship and cargo for salvage: but if *France* was not an enemy, then no more than one-eighth can be allowed.

The decree of the Circuit Court (in which I presided) passed by consent; but although I never gave an opinion, I have never entertained a doubt on the subject. Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between *America* and *France*? In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed *French* vessels, nor even to capture *French* armed vessels lying in a *French* port; and the authority is not given, indiscriminately, to every citizen of *America*, against every citizen of *France*; but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.

There are four acts, authorised by our government, that are demonstrative of state of war. A belligerent power has a right, by the law of nations, to search a neutral vessel; and, upon suspicion

1800. suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of congress, an *American* vessel it authorised: 1st. To resist the search of a *French* public vessel: 2d. To capture any vessel that should attempt, by force, to compel submission to a search: 3d. To re-capture any *American* vessel seized by a *French* vessel; and 4th. To capture any *French* armed vessel wherever found on the high seas. This suspension of the law of nations, this right of capture and re-capture, can only be authorised by an act of the government, which is, in itself, an act of hostility. But still it is a restrained, or limited, hostility; and there are, undoubtedly, many rights attached to a general war, which do not attach to this modification of the powers of defence and aggression. Hence, whether such shall be the denomination of the relative situation of *America* and *France*, has occasioned great controversy at the bar; and, it appears, that Sir *William Scott*, also, was embarrassed in describing it, when he observed, that "in the present state of hostility (if so it may be called) between *America* and *France*," it is the practice of the *English* Court of Admiralty to restore, re-captured *American* property, on payment of a salvage. *Rob. Rep.* 54. *The Santa Cruz*. But, for my part, I cannot perceive the difficulty of the case. As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of "*enemy*" extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If congress had chosen to declare a general war, *France* would have been a general enemy; having chosen to wage a partial war, *France* was, at the time of the capture, only a partial enemy; but still she was an enemy.

It has been urged, however, that congress did not intend the provisions of the act of *March* 1799, for the case of our subsisting qualified hostility with *France*, but for the case of a future state of general war with any nation: I think, however, that the contrary appears from the terms of the law itself, and from the subsequent repeal. In the 9th section it is said, that all the money accruing, "*or which has already accrued from the sale of prizes*," shall constitute a fund for the half-pay of officers and seamen. Now, at the time of making this appropriation, no *prizes*, (which *ex vi termini* implies a capture in a state of war) had been taken from any nation but *France*, those which had been taken, were not taken from *France* as a friend: they must consequently have been taken from her as an enemy; and the retrospective provision of the law can only operate on such prizes. Besides, when the 13th section regulates "the bounty given by the *United States* on any national ship of war, taken from the enemy, and brought into port," it is obvious, that even if the bounty has no relation to previous captures, it must operate from the moment of passing the act,

act, and embraces the case of a national ship of war taken from *France* as an enemy, according to the existing qualified state of hostilities. But the repealing act, passed on the 3d of *March* 1800, (subsequent to the re-capture in the present case) ought to silence all doubt, as to the intention of the legislature: for, if the act of *March* 1799, did not apply to the *French* republic, as an enemy, there could be no reason for altering, or repealing, that part of it, which regulates the rate of salvage on re-captures. 1800.

The acts of congress have been analysed to show, that a war is not openly denounced against *France*, and that *France* is no where expressly called the enemy of *America*: but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favour of the *French* republic, congress had an arduous task to perform, even in preparing for necessary defence, and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the measures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been ripe for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented that decisive event, which many thought would have best suited the interest, as well as the honour of the *United States*. The progress of our contest with *France*, indeed, resembles much the progress of our revolutionary contest; in which, watching the current of public sentiment, the patriots of that day proceeded, step by step, from the supplicatory language of petitions for a redress of grievances; to the bold and noble declaration of national independence.

Having, then, no hesitation in pronouncing, that a partial war exists between *America* and *France*, and that *France* was an enemy, within the meaning of the act of *March* 1799, my voice must be given for affirming the decree of the Circuit Court.

PATERSON, *Justice*. As the case appears on the record, and has been accurately stated by the counsel, and by the judges, who have delivered their opinions, it is not necessary to recapitulate the facts. My opinion shall be expressed in a few words. The *United States* and the *French* republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorised by the constitutional authority of our country. It is a war *quoad hoc*. As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations. It is a maritime war; a war at sea as to certain purposes. The national armed vessels of *France* attack and capture the national armed vessels of the *United States*; and the national armed vessels of the *United States* are expressly authorised and directed to attack, subdue, and take, the national armed vessels

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1800. of *France*, and also to re-capture *American* vessels. It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term "*enemy*," applies; it is the appropriate expression, to be limited in its signification, import, and use, by the qualified nature and operation of the war on our part. The word enemy proceeds the full length of the war, and no farther. Besides, the intention of the legislature as to the meaning of this word, enemy, is clearly deducible from the act for the government of the navy, passed the 2d of *March* 1799. This act embraces the past, present, and future, and contains passages, which point the character of enemy at the *French*, in the most clear and irresistible manner. I shall select one paragraph, namely, that which refers to prizes taken by our public vessels, anterior to the passing of the latter act. The word prizes in this section can apply to the *French*, and the *French* only. This is decisive on the subject of legislative intention.

By the COURT: Let the decree of the Circuit Court be affirmed.